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A. F. R.

Court No. - 4

Case :- CRIMINAL APPEAL No. - 1192 of 1988

Appellant :- Chand And Others

Respondent :- State

Counsel for Appellant :- Khalil Ullah Khan,Raghuvansh Misra,Rahul Misra

Counsel for Respondent :- D.G.A.

Hon'ble Bala Krishna Narayana,J.

Hon'ble Vivek Varma,J.

(1) Heard Sri Rahul Misra, learned counsel for the appellants and Smt. Manju Thakur, learned A.G.A. I for the State.

(2) This appeal has been preferred by appellants, Chand, Saleem and Guddu (hereinafter referred to as A1, A2 and A3) against the judgment and order dated 13.5.1988 passed by Sessions Judge, Rampur in S.T. No. 123 of 1987 (State Vs. Chand and 2 others) arising out of Case Crime No. 33 of 1987, under Sections 302/34 and 449 IPC, P.S. Civil Lines, District Rampur by which all the appellants have been convicted and sentenced to imprisonment for life under Section 302/34 and 5 years rigorous imprisonment under Section 449 IPC. Both the sentences were directed to run concurrently.

(3) Briefly stated the facts of this case are that P. W. 3 Naeem Khan lodged a written report Ext. Ka1 at P.S. Civil Lines, District Rampur on 29.01.1987 at 14:30 hours in respect of an incident which had taken place on the same day at 2/2:15 P.M. alleging therein that Rashid along with P. W. 3 Naeem Khan came to the quarter of P. W. 1 Abdul Aziz on a courtesy call. The friendship between Rashid and the family of the complainant dated back to the days when family members of P. W. 1 Abdul Aziz used to visit the farm of Rajmata in Jwalanagar where Rashid resided.

(4) On the date of incident, at about 2:15 P.M., when the aforesaid two persons after reaching the house of the complainant were conversing with him, Rashid felt an urge to smoke on which P. W. 1 Abdul Aziz got up to bring cigarettes from the market. In the meantime, P. W. 3 Naeem Khan

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volunteered to procure cigarettes. As soon as P. W. 3 Naeem Khan stepped out of the house, he saw all the three appellants heading towards the house of P. W. 1 Abdul Aziz in a menacing manner armed with pistols. Being frightened, P. W. 3 Naeem Khan at once hid himself inside the lavatory of the house of P. W. 1 Abdul Aziz and locked it from inside. At that very point of time, all the three appellants entered into the house of P. W. 1 Abdul Aziz and A1 Chand exhorted his two other brothers to kill Rashid. Rashid in turn implored them not to kill him. However, A1 Chand and his two brothers fired successive shots at Rashid and in order to save himself he fled into the inner room of the house where he was chased and shot. As a result of the gunshot injuries received by him in the occurrence, he died on the spot. There was stampede in the locality; the residents shutdown the main doors of their houses. In the meantime, all the three appellants fled towards the railway station. The occurrence was witnessed by P. W. 1 Abdul Aziz, his wife-P. W. 2 Shahanshahi and his daughter-P. W. 7 Km. Fahim Jahan.

(5) After the accused-appellants had left, P. W. 3 Naeem Khan came out and got the written report Ext. Ka1 of the incident scribed by P. W. 6 Rahat Khan, a distant brother of the deceased which was lodged by him at P.S. Civil Lines, District Rampur on the basis of which P. W. 9 Shanti Swarup, Head Constable prepared the chik report Ext. Ka11 and recorded the contents of the chek FIR in the G.D. at S.No. 39 time 2:30 P.M. dated 29.1.1987.

(6) P. W. 10 A.S. Sharma who was posted as Inspector of P.S. Civil Lines was entrusted with the investigation of the case. The inquest on the cadaver of the deceased was conducted by P. W. 8 S.I. Sitaram Gangwar on the instruction of P. W. 10 A.S. Sharma who after holding the inquest on the spot prepared the inquest report Ext. Ka3, diagram of the dead body Ext. Ka4, challan of dead body Ext. Ka5, letter addressed to C.M.O. Ext. Ka6 and the sample of seal Ext. Ka7. Thereafter, he got the dead body of Rashid dispatched to the district hospital for postmortem

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examination through P. W. 5 Constable Khoob Chand. P. W. 10 A.S. Sharma, I.O. inspected the place of occurrence and prepared the site plan Ext. Ka14. He also collected bloodstained and plain earth from the crime scene and prepared its recovery memo Ext. Ka8. He also found empty cartridges, tikli and pellets and after collecting the same, prepared recovery memo Ext. Ka9. He also prepared the recovery memo of the shawl Ext. Ka10 which was lying on the spot. All the aforesaid articles were deposited by him at the police station and entry whereof was made in the G.D., extract whereof was brought on record during the trial and proved as Ext. Ka13.

(7) The postmortem on the body of deceased-Rashid was conducted by P. W. 4 Dr. M. K. Jain on 30.1.1987 at 12 Noon. He noted following ante mortem injuries on the body of the deceased :

1-Gunshot wound of entry 2 cm x 2 cm x mouth cavity deep mandible of both sides fractured over right side of face 1/2 cm apart from right ear. Margins lacerated and inverted. Blackening scorching and tattooing present.

2- Gunshot wound of entry 2 cm x 2 cm x mouth cavity deep over back of right ear. Margins lacerated and inverted. Blackening, scorching and tattooing present.

3- Gunshot wound of entry 2 cm x 2 cm x chest cavity deep over outer aspect of right side chest, 12 cm below right axilla. Margins lacerated and inverted. Blackening, scorching and tattooing present.

4- Multiple gunshot wound of entry over outer aspect of left side of chest just above the subcostal margins one of them 2 cm x 2 cm x chest cavity deep and others 0.25 x 0.25 cm x margins lacerated and inverted. Blackening, scorching and tattooing present. Muscles protruding out from wound cavity.

5- Gunshot wound of entry 2 cm x 2 cm x bone deep over back of left arm lower part, 5 cm above from left elbow joint. Margins lacerated and inverted. Blackening, scorching and tattooing present.

6- Abrasion 0.25 cm x 0.25 cm over left lower lip.

Cause of death in his opinion was shock and hemorrhage as a result of gunshot ante mortem injuries and the approximate time of death was about one day before the day on which postmortem was conducted.

(8) The investigating officer of the case P. W. 10 A. S. Sharma after

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completing the investigation filed charge sheet Ext. Ka15 before CJM, Rampur who committed the case for trial of the accused to the Court of Sessions Judge, Rampur where case crime no. 33 of 1987 was registered as S.T. No. 123 of 1987 who on the basis of the material on record and after hearing the prosecution and the defence on the point of charge, framed charge under Sections 302/34 and 449 IPC against all the three appellants who abjured the charge and claimed trial.

(9) In support of it's case, the prosecution examined P. W. 1 Abdul Aziz, P. W. 2 Shahanshahi Begum, P. W. 3 Naeem Khan, P. W. 7 Km. Fahim Jahan as witnesses of fact, P. W. 6 Rahat Khan who proved the written report of the incident Ext. Ka1 while P. W. 4 Dr. M. K. Jain who proved the postmortem report, P. W. 5 Constable Khoob Chand who proved the carrying of the dead body to district hospital, P. W. 8 S.I. Sita Ram Gangwar and P. W. 10 A.S. Sharma who had conducted the investigation and P. W. 9 Head Constable Shanti Swarup were produced as formal witnesses. Besides, the prosecution relied upon Exts. Ka1 to Ka15 in support of it's case reference to which has already been made above.

(10) The appellants examined Ali Sher as D. W. 1, time clerk of the office of Raza Textiles Ltd. to prove that P. W. 1 Abdul Aziz should had been in the mill at the time of occurrence. Besides, Exts. Kha1 to Kha13 were relied upon to prove the adverse antecedents of the deceased, the first informant and also to prove efforts on the part of the appellants to get the identification test parade of the accused conducted in which the female witnesses might have been asked to identify the accused.

(11) Learned Sessions Judge after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record both oral as well as documentary, convicted all the three appellants and awarded aforesaid sentences to them.

(12) Hence this appeal.

(13) Learned counsel for the appellants has submitted that it is proved

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from the facts deposed by the prosecution witnesses themselves in their evidence tendered before the trial court, the documentary evidence on record as well as the attending circumstances that the FIR in this case is ante timed and hence no reliance could be placed on the prosecution version as spelt out therein which the learned Sessions Judge found to have been proved from the evidence adduced by the prosecution at the trial which was apparently false and concocted and manufactured with the sole malafide intention of falsely implicating the appellants. It is next contended that it is fully established from the evidence on record that after the incident had taken place inside the house of P. W. 1 Abdul Aziz, he and his other family members were initially made accused and taken to the police station. However at the instance of and on the intervention of the brother of the deceased, Ashraf who along with the deceased were facing trial for the charge of the murder of one Bhoora, the real brother of the appellants, a false FIR was prepared in the police station falsely implicating the appellants as a measure of vendetta on the part of Ashraf after he had struck a deal with P. W.1 Abdul Aziz and his other family members to the effect that in case they gave evidence against the appellants they would not be arraigned as accused. He also contended that there is no convincing evidence on record showing that all the three appellants were previously known to P. W. 1 Abdul Aziz, his wife-P. W. 2 Shahanshahi and his daughter-P. W. 7 Km. Fahim Jahan and hence the identification of the appellants in the Court for the first time without holding test identification parade during the investigation despite the appellants having moved an application before the CJM during the investigation in this regard, is not sufficient to establish the complicity of the appellants in committing the murder of Rashid. He lastly contended that neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and are liable to be set aside.

(14) Per contra Smt. Manju Thakur, learned A.G.A. I appearing for the State contended that the the contention of the learned counsel for the

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appellants that the FIR in this case is ante timed is wholly misconceived and is liable to be rejected summarily. She next contended that the incident had taken place in broad day light inside the house of P. W. 1 Abdul Aziz which was witnessed not only by P. W. 1 Abdul Aziz but also by his wife-P. W. 2 Shahanshahi and his daughter-P. W. 7 Km. Faheem Jahan who had deposed about the accused coming into the house of the informant. P. W. 3 Naeem Khan had deposed that he had heard sounds of gunshots while he had hidden himself inside lavatory of the house of P. W. 1 Abdul Aziz. She further contended that the ocular version finds full corroboration from the medical evidence on record in all material particulars pertaining to the incident and the testimony of the three eye-witnesses, cannot be rejected on the ground of there being some discrepancies and contradictions in their statements which do not go to the core of the prosecution case. She lastly submitted that this appeal lacks merit and is accordingly dismissed.

(15) We have heard the learned counsel for the parties at great length and very carefully perused the entire lower court record.

(16) The record of this case indicates that Rashid was shot inside the house of P. W. 1 Abdul Aziz in the presence of his wife-P. W. 2 Shahanshahi and his daughter-P. W. 7 Km. Fahim Jahan at about 2/2:15 P.M. on 29.1.1987.

(17) The report of the incident Ext. Ka1 which was lodged by P. W. 3 Naeem Khan was scribed by P. W. 6 Rahat Khan on the dictation of P. W. 1 Abdul Aziz and lodged at P.S. Civil Lines, District Rampur within 15 minutes at 14:30 hours. The first and the foremost ground on which the appellant's counsel has assailed the recorded conviction of the appellants is that the FIR in this case is ante timed and the prosecution story narrated therein is wholly false and concocted with the malafide intention of procuring the conviction of the appellants.

(18) Before proceeding to examine the evidence of the four witnesses of fact produced by the prosecution during the trial with the object of

ascertaining its veracity, we first propose to have a glance at the evidence of the formal witnesses.

(19) P. W. 4 Dr. M.K. Jain who had conducted the postmortem on the dead body of Rashid, in his statement recorded during the trial deposed that he had conducted the postmortem on the dead body of Rashid in Government Hospital Rampur on 30.1.1987 at about 12 Noon. He proved the postmortem report of the deceased as Ext. Ka2.

(20) P. W. 5 Head Constable Khoob Chand deposed that he had been handed over the dead body of the deceased on 29.1.1987 by P. W. 8 Sub-Inspector Sitaram Gangwar after the completion of inquest along with related papers. He had delivered the dead body of the deceased for postmortem examination on 30.01.1987.

(21) P. W. 6 Rahat Khan, scribe of the FIR deposed before the trial court on his attention being drawn to Ext. Ka1 that he had scribed the said report on the dictation of P. W. 3 Naeem Khan. He in his cross-examination deposed that he at the time of the incident was employed in the shop of Jolly Radio and he was on duty. His duty started at 10 A.M. and finished by 9 P.M. He had never seen the place where Rashid had been murdered. Deceased-Rashid was his cousin brother. He had scribed the written report in the hotel of Anandi Lal. The paper was brought by P. W. 3 NaeemKhan.

(22) P. W. 8 Sub-Inspector Sitaram Gangwar in his evidence tendered before the trial court proved the inquest report, diagram of the dead body, challan lash, report addressed to C.M.O. and the sample of seal as Ext. Ka3, Ext. Ka4, Ext. Ka5, Ext. Ka6 and Ext. Ka7 recovery memos of the plain and bloodstained earth collected from the place of incident, 5 empty cartridges, 3 tikli and one bloodstained pellet and 30 pellets seized by him from the spot and recovery memo from the spot, bloodstained earth and one shawl.

(23) In his cross-examination on page 76-77 of the paper book, he admitted that he had failed to mention the name of the accused-appellants

in the inquest report of the deceased inadvertently.

(24) He denied the suggestions given to him by the defence counsel that on Ext. Ka4, the crime number was initially written as 32 but was later on converted to 33 by over writing.

(25) He denied the suggestion given to him by the defence counsel that the entire papers pertaining to the inquest were prepared in the police station after 12 P.M.

(26) P. W. 9 Head Moharrir Shanti Swarup stated before the trial court that on 29.1.1987 he was posted at P.S. Civil Lines. On that date, at about 14:30 hours, P. W. 3 Naeem Khan had given a written complaint Ext. Ka1 to him on the basis of which he had prepared chek report Ext. Ka1 in his handwriting and recorded the case in G.D. at S.N. 39 at the same time. He proved the carbon copy of the chek FIR and the G.D. entry as Ext. Ka12. He also deposed that on the same day at 6:15 P.M., P. W. 8 S.I. Sitaram Gangwar had deposited one sealed bundle in the police station. The aforesaid fact was recorded in the G.D. at S.N. 49, carbon copy whereof was proved by him as Ext. Ka12.

(27) In his cross-examination, he denied the suggestions given to him that the chek FIR Ext. Ka11 and the G.D. entries were prepared after 12 midnight.

(28) He further stated that he had given the copy of the G.D. report immediately to the complainant and it was incorrect to allege that the copy of the chek FIR was given to the complainant in the midnight.

(29) S.H.O. A. S. Sharma, the investigating officer of the case who at the relevant point of time was posted as Inspector, In-Charge at P.S. Civil Lines was examined as P. W. 10. A.S. Sharma in his evidence tendered during the trial narrated the various steps taken by him during the course of the investigation. He proved the site plan of the place of incident as Ext. Ka14 and charge sheet Ext. Ka15.

(30) He denied the suggestion given to him by the defence counsel that initially P. W. 1 Abdul Aziz and P. W. 3 Naeem Khan were arrested in

connection with the murder of Rashid and were detained in the police station till the midnight.

(31) P. W. 11 Dr. S.C. Singhal posted as Medical Officer in District Jail Rampur deposed that he had examined the injuries of appellant-Guddu son of Guchchan Khan on 3.2.1987. We do not find it proper to refer to the evidence of P. W. 11 Dr. S. C. Singhal and P. W. 13 Dr. G. K. Jain who were examined during the trial on the point of age of A1 Chand on the date of incident for the purpose of deciding whether he was child within the meaning as defined under the Children Act on the date of incident or not.

(32) Thus, from the evidence of the formal witnesses, it is established that the deceased had died as a result of the gunshot wounds found on his body. The incident had taken place inside the house of P. W. 1 Abdul Aziz at about 2/2:15 P.M.

(33) We now proceed to examine whether the prosecution has been able to prove beyond all reasonable doubts that the authors of the firearm wounds found on the body of the deceased are the appellants or someone else. On the point of the incident, we have on record the evidence of P. W. 1 Abdul Aziz, his wife-P. W. 2 Shahanshahi, complainant-P. W. 3 Naeem Khan and his daughter-P. W. 7 Km. Faheem Jahan.

(34) P. W. 1 Abdul Aziz is a witness in whose house occurrence had taken place. He, in his examination-in-chief has recited the entire prosecution story in full. He in his cross-examination stated that he is an employee of Raza Textiles Mill and works as welder. His evidence is that he went to mill about quarter hour before the exact time of commencement of duty. On that day, his duty was to commence from 3 P.M. Therefore, he had got himself ready for the same. He went on to state that his presence was noted in the register of mill by one Jab Sahib. That day, he ultimately did not got to the mill. In fact, he did not go for couple of months because of this incident. He denied the suggestion that at the time of occurrence he was not present on the spot and that he was in the

mill. He also denied the suggestion that earlier he was made an accused in this murder. He went on to state that intimate relations had developed with Rashid for about 2 or 3 months before the occurrence. In fact these relations had developed with the entire family of Rashid. He also stated that Rashid was Punjabi Musalman whereas he was a Pathan.

(35) In our opinion the explanation given by P. W. 1 Abdul Aziz in his cross-examination with regard to his being marked absent in the Muster Roll and he was present in his house on the date of incident does not appear to be plausible at all. Muster Keeper Roll would have been most reliable witness for corroborating the explanation submitted by P. W. 1 Abdul Aziz for his being marked absent in the Muster Roll on the date of incident, although initially he was marked present, was surprisingly withheld by the prosecution. In his cross-examination on page 35 of the paper book, he further stated that when the dead body was lifted from his house and when the FIR was written, he met P. W. 6 Rahat Khan. They were asked to stand outside the police station. Father of P. W. 3 Naeem Khan, uncle of P. W. 6 Rahat Khan and brother of Rashid were present inside the police station. It was, at about 6-7 P.M. He was not aware what P. W. 3 Naeem Khan and P. W. 6 Rahat Khan were doing inside the police station. He thought that they were lodging the report of the occurrence. Rahat's father had asked him to stand outside the police station. Rashid's uncle had said that Rashid was a gentleman and the report should be lodged on his behalf. However, he denied the suggestion that the uncle of Rashid had stated before the police that he wanted to arraign him as an accused. He admitted on page 36 of his cross-examination that he had remained standing outside the police station till 11 P.M. / 12 midnight, although he denied the suggestion that the FIR of the incident was lodged after 12 P.M. He also deposed that although everybody was talking about the illicit relationship of his daughter but it was incorrect. On page 38 of the paper book, he in his cross-examination deposed that the appellants had remained in his house for five minutes.

(36) P. W. 2 Shahanshahi in her examination-in-chief has narrated the entire prosecution story. In her cross-examination, she has stated that Rashid was not her relative. The accused were also not her relatives. Intimate relations had developed with Rashid and his family members about 7 or 8 months before the occurrence. Since sisters of Rashid had started to visit her family, there was no Purdah between the two families. She further stated that the accused lived in Mohalla Jhandi of Rampur town. She did not know Naeem from before hand. She further stated that Bhoora was the brother of the accused, who was murdered and Rashid and Ashraf were accused in that case. After the occurrence, Ashraf and Rahat had come to her house, but by that time police had not come. They had taken her to their house and after that police had come. She went on to state that at the time of occurrence her husband was getting ready for going to mill. She also stated that she cannot tell as to how many shots had been fired inside her house. One shot was fired outside her house. When Rashid went inside the house, then some more shots were fired. First shot was fired in the Dalan, where a cot was lying. There Rashid was talking to her husband. First shot was fired by the accused from the outer door, which was at a distance of 2 to 4 paces. She further stated that when accused fired at Rashid, they had not grappled with him. During the entire duration of firing, her husband had remained inside his house. In her cross-examination, she denied the suggestion that her husband was earlier arrested by the police in connection with the murder of Rashid and thereafter at the instance of Ashraf, the case against the appellant was fabricated after letting Abdul Aziz go.

(37) P. W. 2 Shahanshi in her cross-examination on page 46 of the paper book deposed that she had heard that Bhoora was the brother of accused-appellants who had been murdered and deceased-Rashid and Ashraf were accused of his murder. On the date of occurrence, Ashraf had come to her house after about one hour of the murder of Rashid. Rashid's brother Rahat had also come. People told that Rahat was cousin brother of

Rashid. Rahat had come to her house after Ashraf. Ashraf had come 10-15 minutes after Rahat's arrival. Ashraf and Rahat had stayed in her house 10-15 minutes. When Ashraf and Rahat had come to her house, the police had not come to her house. Ashraf and Rahat took her mother to the place of her mother's place and then returned and then police had come. It was evening by the time they had returned.

(38) P. W. 3 Naeem Khan corroborated the evidence of P. W. 1 Abdul Aziz and P. W. 2 Shahanshi in all material particulars pertaining to the incident but it is established from his evidence and also rightly recorded by the trial court that he could not have witnessed the occurrence.

(39) The question which next arises for our consideration in this appeal is if he had not seen the occurrence, how, he could have described the incident in the written report with such precision defining the role of each of the three accused-appellants. There is nothing either in the written report of the incident or in his evidence indicating that whatever he had dictated to P. W. 6 Rahat Khan, scribe of the FIR was narrated to him by P. W. 1 Abdul Aziz, P. W. 2 Shahanshi or P. W. 7 Km. Faheem Jahan. In fact it has come in the examination-in-chief of P. W. 3 Naeem Khan himself that after the appellants had fled, he had come out of his hiding place and gone inside the room where he saw Rashid lying dead. He waited for 10-15 minutes and then went to near Anandi Lal's Hotel where he met Rahat. He got the written report of the incident scribed by Rahat on his dictation outside the hotel. In his cross-examination on page 54 of the paper book, this witness in contradiction to what was deposed by P. W. 5 Constable Khoob Chand in his examination-in-chief stated that he was given a copy of the check report at 11 P.M. after 8-10 minutes of lodging the report. He again admitted on page 55 of the paper book in his cross-examination that since a huge crowd had gathered outside the police station, he had stayed in the police station from 2:30 P.M. to 11 P.M. He again admitted on page 56 of the paper book that the police had arrived at the house of P. W. 1 Abdul Aziz within 10-15 minutes. The police had

remained in his house for about 45 minutes. When the police had reached the house of P. W. 1 Abdul Aziz then he had got the written report of the incident scribed. On page 57 of the paper book, he deposed that after the written report of the incident Ext. Ka1 was scribed, it was kept by Rahat. Both Rahat and he had gone to the police station. The written report of the incident was given at the police station to the Darogaji by Rahat.

(40) P. W. 7 Km. Faheem Jahan, the eye-witness of the occurrence deposed in her examination-in-chief that Rashid who had been murdered in her house was known to her since about 1 year and 6 months before the incident. On the date of incident, at about 2:15 P.M., Rashid had come to her house with P. W. 3 Naeem Khan and was talking to her father. Rashid suddenly felt an urge to smoke on which P. W. 3 Naeem Khan started to go out of the house to procure cigarettes. However, as soon as he reached the door of the house, the appellants who were present in the courtyard armed with country made pistols entered into the house. Rashid pleaded them to at least listen to him but A1 Chand exhorted the other appellants to kill him on which A1 Chand fired at Rashid who ran inside the house and locked the lavatory from inside. All the appellants chased him into the room and fled after committing his murder. The incident was witnessed by P. W. 1 Abdul Aziz, his wife-P. W. 2 Shahanshahi and his daughter-P. W. 7 Km. Fahim Jahan. P. W. 3 Naeem Khan had hid himself inside the lavatory of her house. She in her cross-examination stated that she had met Rashid about 5 to 6 months before the occurrence in the farm of Rajmata. He was a handsome young man. She has further stated that other family members of Rashid also used to meet her. At another place she stated that Rahat and Ashraf did not come to her residence.

(41) Thus, upon a meticulous scrutiny and appraisal of the evidence of the four witnesses of fact examined by the prosecution during the trial for proving the charges framed against the appellants, we find that as far as P. W. 1 Abdul Aziz is concerned, his presence at the time and place of the incident is highly doubtful. As regards P. W. 3 Naeem Khan

(complainant), his claim of having witnessed the incident has been disbelieved by the trial judge himself and rightly so. Now we are left with the testimony of P. W. 2 Shahanshahi, wife of P. W. 1 Abdul Aziz and P. W. 7 Km. Faheem Jahan, daughter of P. W. 1 Abdul Aziz.

(42) We have very carefully scanned their statements but we have not found anything therein which may show that the three appellants were previously known to them and in case they were not known to them from before in that case whether identification of the appellants for the first time in the court room by them without being preceded by their identification in any identification test parade, would be sufficient to fasten the guilt of the murder of Rashid on them. P. W. 2 Shahanshahi apart from deposing that she knew the appellants who were present in the court has stated nothing else in her entire examination-in-chief. How, they were known to her and since then. There is no evidence that the appellants were either regular visitors to the house of P. W. 1 Abdul Aziz or related to them. As far as P. W. 7 Km. Faheem Jahan is concerned, she did not depose even in her examination-in-chief that she knew the appellants previously. It is true that the evidence of test identification parade is only a corroborative piece of evidence but it has been held in various cases that where the accused was not previously known to the witnesses then his identification by the witnesses for the first time in the court is a weak piece of evidence.

(43) The issue whether the identification of an accused by the witness for the first time in the Court without being preceded by any test identification parade has any evidentiary value or not has been examined by the Apex Court on several occasions.

In Suresh Chandra Bahri vs. State of Bihar : 1995 Supp (1) SCC 80 this Court held that it is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it

furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution.

Thereafter this Court observed :-

"But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TI parade."

In State of Uttar Pradesh vs. Boota Singh and others : (1979) 1 SCC 31 this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad day light, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes.

In Ramanbhai Naranbhai Patel and others vs. State of Gujarat : (2000) 1 SCC 358 after considering the earlier decisions this Court observed :-

"It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of State (Delhi Admn.) vs. V.C. Shukla wherein also Fazal Ali, J. speaking for a three-

Jude Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eyewitnesses. It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless ; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned counsel for the appellants that the later decisions of this Court in the case of *Rajesh Govind Jagesha vs. State of Maharashtra* and *State of H.P. vs. Lekh Raj* had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned counsel for the appellants that the evidence of these two injured witnesses i.e. *Bhogilal Ranchhodbhai* and *Karsanbhai Vallabhbai* identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them."

(44) Although the Apex court in the case of **Malkhan Singh and others Versus State of Madhya Pradesh (2003) 5 SCC 746** had

reiterated that the evidence of identification in Court is a substantive evidence but the Apex Court in para 7 and 10 of the same judgement has observed as hereunder:

7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings.....

10. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court.

(45) In the Case of **Balbir Versus Vazir & Ors. reported in 2014 Vol. 12 SCC 670** the Apex Court, had distinguishing the facts of the case of Malkhan Singh (supra) has held as hereunder:

"What weight must be attached to the evidence of identification in Court, is a matter for the Court of fact to examine"

(46) The case of **Malkhan Singh (supra)** was a case of gang rape where several persons had committed rape with the prosecutrix one by one giving ample opportunity to the prosecutrix to have a close look and

remember their faces on account of traumatic and tragic experience she had undergone and the faces of the accused must have got imprinted in her memory and there was no chance of her making mistake about their identity and in the backdrop of the aforesaid facts, the identification of accused by the prosecutrix for the first time in the open court was held reliable in Malkhan Singh's case.

(47) Thus from the reading of the aforesaid judgements the legal principle which emerges is that the identification of an accused in the Court is substantive evidence and can be relied upon even in the absence of any test identification parade when the accused was previously known to the witnesses or the witness had an opportunity to have a clear look at the accused enabling him to remember his face where the accused was not previously known to him but in a case where the accused is not known to the witness previously and he did not have an opportunity to view the accused clearly during the course of occurrence or for a sufficiently long time or where the incident had taken place in a flash of moment in dark, as in the present case, the identification of the accused for the first time in the court shall be valueless in case the same is not preceded by test identification parade.

(48) Coming back to the facts of the present case, we have already held that the evidence of P. W. 2 Shahanshahi and P. W. 7 Km. Faheem Jahan on the point of their identification of the appellants on the ground that they were previously known to them, is neither reliable nor trustworthy. Moreover the incident had taken place hardly within 4 or 5 minutes, during which it was not possible for P. W. 2 Shahanshahi and P. W. 7 Km. Faheem Jahan to have an opportunity to view the accused-appellants, if the prosecution case is to be believed that repeated shots were fired.

(49) Thus, the identification of the appellants by P. W. 2 Shahanshahi and P.W.7 Km. Faheem Jahan was made for the first time in the Court which was not preceded by any test identification parade. In view of the above, in

our opinion, it would not be safe to place any reliance on the evidence of the identification of the appellants for the first time in the Court by P. W. 2 Shahanshahi and P. W. 7 Km. Faheem Jahan in the absence of it being preceded by any test identification parade.

(50) Thus, we do not find the evidence of P. W. 2 Shahanshahi and P. W. 2 Km. Faheem Jahan reliable on the point of the identification of the accused-appellants.

(51) Now coming to the FIR of this case, we find that there are material contradictions in the statements of the prosecution witnesses of fact with regard to the time at which the FIR was lodged. There is one more circumstance which creates a doubt about the authenticity of the FIR of this case namely the same being not lodged by any of the three eye-witnesses but by a person i.e. P. W. 3 Naeem Khan who although claims that he was present at the time of the occurrence but who had not witnessed the same. The FIR in this case has been lodged too promptly. The incident had taken place between 2 - 2:15 P.M. It has come in the testimony of P. W. 3 Naeem Khan that the occurrence had lasted about 5-10 minutes. He further deposed in his evidence that after the accused had left the place of occurrence he had come out of his hiding place and gone inside the room where Rashid was lying dead, stayed there for about 50-10 minutes and then he had gone to near Anandi Lal Hotel where he met Rahat, cousin of the deceased, dictated the written report of the incident to him and then went to the police station and lodged the same at 2:30 P.M. The distance between the police station and the place of occurrence is stated to be about 1 km. It is not the prosecution case that P. W. 3 Naeem Khan had gone to the police station on a scooter or a four wheeler. There is another circumstance which creates a doubt about the credibility of the FIR. Although P. W. 6 Rahat, scribe of the chek FIR and the author of the G.D. entry have deposed that the written report of the incident was handed over to him by P. W. 3 Naeem Khan but P. W. 3 Naeem Khan has himself stated in his cross-examination that he had gone to the police station with

Rahat who had kept the written report of the incident after scribing the same in his pocket. The written report of the incident was given to the darogaji, present in the police station by P. W. 6 Rahat. While P. W. 6 Rahat said that after registering the case and preparing the chek FIR Darogaji immediately handed over the copy of the chek FIR to P. W. 3 Naeem Khan but P. W. 3 Naeem Khan in his cross-examination has deposed that he was given the copy of the chek FIR at about 11 P.M. From the facts stated by P. W. 2 Shahanshahi in her examination-in-chief, it further transpires and appears that immediately after the occurrence within an hour of the occurrence Ashraf and Rahat had come to the house of P. W. 1 Abdul Aziz and thereafter the police had also come and then they had gone to lodge the FIR of the incident. Neither P. W. 1 Abdul Aziz nor P. W. 3 Naeem Khan have deposed that either Ashraf or Rahat had come to the house of P. W. 1 P. W. 1 Abdul Aziz after the incident and thereafter police had arrived at the occurrence in their presence, and then they had gone to lodge the FIR. There is evidence of P. W. 1 Abdul Aziz himself that he had remained in the police station till 11 P.M. No explanation is coming forth from the side of the prosecution for P. W. 1 Abdul Aziz remaining at the police station till 11 P.M. Moreover from his evidence, it is further established that deceased's-brother Asraf, uncle and father were also present in the police station till late in the evening. The aforesaid discrepancies and contradictions in the prosecution case do give credence to the defence version that the FIR was not lodged or registered at the time mentioned in the chek FIR or the FIR which was initially written was not registered and another written report of the incident came into existence at the police station. The changing of the case crime no. on the inquest report from 32 to 33 by over writing on the inquest report and the other documents prepared at the time of the inquest are also indicative of the fact that case crime no. 33 was not in existence at the time of the inquest. There is nothing in the evidence of P. W. 10 A.S. Sharma and P. W. 8 Sitaram Gangwar showing that the papers which were sent along

with the dead body to the district hospital included the chek FIR as well as the G.D. entry. The absence of the names of the accused in the inquest report is another circumstance which gives rise to an inference that the identity of the perpetrators of the crime was not known at the time of the holding of the inquest. There is also no evidence on record showing the special report of the case was dispatched to the superior officers promptly. In fact the column in the chek FIR for recording the time of dispatch of special report contains a recital "Dak", it neither discloses the time nor the date of dispatch. There is further no explanation why it was sent by post. In view of the aforesaid discrepancies and contradictions in the prosecution case and the evidence of the prosecution witnesses with regard to time of lodging of the FIR, we find it difficult to believe that the FIR was registered at the time mentioned in the chek FIR. Since the credibility of the FIR of the case itself stands shattered, in our opinion it would not be safe to maintain the recorded conviction of the appellants on the basis of the prosecution story set forth therein and the evidence of the witnesses who apparently appeared to be tutored.

(52) Thus, upon a wholesome consideration of the facts of the case, the evidence on record and the attending circumstances, we find that the evidence of witnesses of fact produced by the prosecution during the trial is neither consistent nor clinching. On the other hand, the witnesses appear to be vacillating all the time during the recording of their testimony.

(53) For the aforesaid reasons, we are of the view that the prosecution has not been able to prove its case against the accused-appellants beyond all reasonable doubts and hence they are entitled to benefit of doubt.

(54) Consequently, this appeal is allowed. The impugned judgment and order dated 13.5.1988 passed by Sessions Judge, Rampur in S.T. No. 123 of 1987 (State Vs. Chand and 2 others) is set aside.

(55) The appellants are on bail. They need not surrender. Their bail bonds are cancelled and the sureties discharged. The appellants shall

(22)

however comply with the mandatory provisions of Section 437-A of the Cr.P.C.

Order Date :- 11.11.2019

SA